

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20010217

Cass County Joint Water Resource)
District, a political subdivision of the)
State of North Dakota,)

Appellant,)

vs.)

1.43 Acres of Land in Highland)
Township, Cass County, North Dakota,)
Turtle Mountain Band of Chippewa)
Indians, a/k/a Turtle Lake Band of)
Chippewa Indians, and Roger W. Shea,)

Appellees.)

IN THE OFFICE OF THE
CLERK OF THE SUPREME COURT

NOV 16 2001

STATE OF NORTH DAKOTA

Supreme Court No. 20010217

APPEAL FROM THE JUDGMENT OF DISMISSAL, DATED AUGUST 31, 2001,
FROM THE HONORABLE GEORGIA DAWSON, EAST CENTRAL
JUDICIAL DISTRICT COURT

BRIEF OF AMICUS CURIAE
NORTH DAKOTA ASSOCIATION OF COUNTIES & *Addendum*

ROLFSON SCHULZ LERVICK & GEIERMANN
LAW OFFICES, P.C.
Calvin N. Rolfson (ID #02824)
Attorney for North Dakota Association of
Counties
425 North Fifth Street
P.O. Box 2196
Bismarck, ND 58502-2196
(701) 223-1986

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| I. TABLE OF AUTHORITIES..... | 3 |
| II. INTEREST OF AMICUS CURIAE..... | 5 |
| III. STATEMENT OF CASE AND ISSUES PRESENTED FOR REVIEW..... | 6 |
| IV. POSITION OF AMICUS CURIAE..... | 7 |
| V. ARGUMENT..... | 7 |
| VI. CONCLUSION..... | 12 |
| VII. CERTIFICATE OF SERVICE..... | 13 |
| VIII. ADDENDUM..... | 14 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>PAGE</u> |
|---|-------------|
| <u>County of Stutzman v. State Historical Society,</u> 371 N.W.2d 321 (N.D. 1985)..... | 8 |
| <u>Johnson v. Wells County Water Resource Board,</u> 410 N.W.2d 525 (N.D. 1987)..... | 8 |
| <u>Paulus v. State of South Dakota,</u> 227 N.W. 52 (N.D. 1929)..... | 10 |
| <u>Percival v. Bankers Trust Co.,</u> 450 N.W.2d 860 (Iowa 1990)..... | 9 |
| <u>Schaffer v. Heitner,</u> 433 U.S. 189, 97 S. Ct. 2569, 35 L. Ed.2d 683 (1977)..... | 9 |
| <u>Smith v. Smith,</u> 459 N.W.2d 785 (N.D. 1990)..... | 9 |
| <u>State of Georgia v. City of Chattanooga,</u> 264 U.S. 472, 44 S. Ct. 369, 68 L. Ed. 796 (1924)..... | 10 |
| <u>Statutes and Rules</u> | |
| North Dakota Century Code: | |
| Ch. 61-16..... | 5 |
| Ch. 61-16.1..... | 5 |
| Ch. 61-16.2..... | 5 |
| § 11-10-24..... | 5 |
| § 11-10-28..... | 6 |
| § 61-16-05..... | 7 |
| § 61-16-07..... | 5 |
| North Dakota Constitution: | |
| Art. I, § 16..... | 8 |
| Art. VII, § 1..... | 8 |
| Art. VII, § 3..... | 5 |

| | |
|-----------------------------|---|
| United States Constitution: | |
| Amend. X..... | 8 |

Calvin N. Rolfson, attorney for the North Dakota Association of Counties, hereby submits the following brief in support of its position as amicus curiae in the above-entitled case.

INTEREST OF AMICUS CURIAE

The North Dakota Association of Counties (the "Association") is a North Dakota non profit corporation. The Association has an interest in this proceeding because it is organized by the counties of North Dakota and is authorized by North Dakota law to uphold and maintain the collective interests of the state's counties. NDCC §11-10-24. Cass County, North Dakota is one of those counties and is a member of the Association. N.D. Const. art. VII, § 3.

The Cass County Joint Water Resource District (the "CCJWRD"), appellant herein, is a political subdivision of the state of North Dakota authorized to manage the state's water resources within Cass County. NDCC Chs. 61-16, 61-16.1 and 61-16.2. The CCJWRD is comprised of four water resource districts within Cass County, North Dakota. Appendix, p. 40, 125. The CCJWRD exists entirely within the boundaries of Cass County, North Dakota. Appendix, p. 40. As such, the Cass County Board of County Commissioners is responsible to appoint the CCJWRD joint board and Cass County therefore has a direct, active and statutory responsibility for the CCJWRD as the appointing authority of the CCJWRD. NDCC § 61-16-07.

The Association is the only entity authorized by North Dakota law to support the collective interests of the counties of North Dakota and the political subdivisions or governmental entities with which they may be involved. The Association has a state and national reputation for promoting the interests of the counties and their related political subdivisions for the benefit of the citizens of North Dakota. See attached Addendum, 1-4. The Association is required by law to conduct training sessions for all newly elected county commissioners and other county officials. NDCC § 11-10-28. In addition, the Association voluntarily supports or conducts educational seminars for water resource districts such as the CCJWRD. As a result, the Association has a statutory, corporate and mission-driven responsibility to educate, support and provide leadership to the counties of North Dakota, their various elected and appointed officials and the related political subdivisions within such counties, and to address important issues facing them, including issues regarding their ability to condemn property for the public good.

STATEMENT OF CASE AND ISSUES PRESENTED FOR REVIEW

The Association adopts the Statement of Issues and Statement of the Case as well as the Procedural and Substantive Facts set out by the CCJWRD in its brief.

POSITION OF AMICUS CURIAE

The impact of the district court's decision in this case carries with it the real potential of adversely and unlawfully affecting all political subdivisions of North Dakota, as it prevents an eminent domain proceeding under the guise of a land sale to Indian tribes. If the district court's judgment is sustained, the sovereignty of the state of North Dakota and its duly constituted political subdivisions, including the 53 counties of North Dakota, the various water resource districts within North Dakota, and all other political subdivisions possessing powers of eminent domain, may be adversely and irreversibly impeded. In other words, their respective duties to protect the health and welfare of the citizens of North Dakota would be absolutely subject to the whims and actions of single individuals in the case of eminent domain proceedings. Because all land within North Dakota is required to be within a water resource district, and the state of North Dakota and its counties must be concerned about and able to effectively manage its water resource districts, the sovereign interests of the state of North Dakota are also adversely affected by the district court's judgment. NDCC § 61-16-05.

ARGUMENT

The legal arguments of the CCJWRD's brief are adopted by the amicus curiae Association. In addition, the following law and argument analysis is offered.

North Dakota is a sovereign state entitled to the benefits of sovereignty for the well-being of its citizens. See U.S. Const. amend. 10. Political subdivisions of North Dakota are created by the state's Constitution for the purpose of maximizing local state government and minimizing duplication of state governmental functions. N.D. Const. art. VII, § 1. The North Dakota Legislative Assembly, in exercising its constitutionally-mandated policy for the state, is required to establish political subdivisions as agencies of the state of North Dakota for the purpose of exercising its powers, which powers may not be invoked in opposition to the will of the state. County of Stutzman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985).

By the power of eminent domain, the state and any of its political subdivisions possessing such authority may take property for the public good, subject to the right of the landowner to just compensation for damages resulting from the necessary taking. N.D. Const. art I, §16. Eminent domain is a right that is a direct attribute of sovereignty and does not even require or depend upon a constitutional grant or recognition. Johnson v. Wells County Water Resource Board, 410 N.W.2d 525 (N.D. 1987).

The difficulty that is presented by the district court's Memorandum Opinion, Order and Judgment in this matter is that if both subject matter jurisdiction and *in personam* jurisdiction, rather than *in rem* jurisdiction, is necessary for a condemnation proceeding to go forward, any party aggrieved by a condemnation for the public good may simply transfer the property at issue to someone over whom

a state court has no personal jurisdiction, such as another sovereign or quasi-sovereign, and thereby thwart, stall or subvert that public good.

For this reason, this Court has specifically held that *in rem* actions do not need to proceed through *in personam* jurisdiction so long as there are sufficient contacts to meet due process requirements. Smith v. Smith, 459 N.W.2d 785 (N.D. 1990); citing Schaffer v. Heitner, 433 U.S. 189, 97 S. Ct. 2569, 35 L. Ed.2d 683 (1977); accord, Percival v. Bankers Trust Co., 450 N.W.2d 860 (Iowa 1990) (allowing *in rem* jurisdiction to suffice in an action concerning a trust so long as minimum contacts existed over the person or in whom *in personam* jurisdiction may be lacking).

What the Association finds so abhorrent is the apparent subterfuge used by the Turtle Mountain Band of Chippewa Indians (the "Tribe") and the former landowner (Roger W. Shea) to thwart the constitutional rights of the sovereignty of North Dakota and its vital political subdivisions - Cass County and the CCJWRD. In this case, the Tribe purchased a small tract of land (1.43 acres) for a nominal amount in a geographic area within Cass County that is hundreds of miles from the exterior borders of the Tribe's reservation. The Tribe knew that the land was needed for an important public project designed and intended to protect 7,750 acres of land from devastating flooding, which would result in annual economic benefits to the condemnation project in the amount of \$4,305,000. Appendix, p. 125-126. The Tribe is now claiming that no condemnation proceeding can take place, thereby eliminating the public project, under the guise of the Tribe's sovereign immunity.

The case law cited by the CCJWRD in its brief rejects the validity of such a subterfuge. If the City of Chattanooga, Tennessee can condemn land owned in that state by the state of Georgia, against the wishes of Georgia, certainly a political subdivision of the state of North Dakota with the power of eminent domain (CCJWRD), can constitutionally and lawfully condemn land acquired by the Tribe outside its reservation lands. State of Georgia v. City of Chattanooga, 264 U.S. 472, 44 S. Ct. 369, 68 L. Ed. 796 (1924). Importantly, the land at issue was acquired by the Tribe from a private citizen (Roger W. Shea), and is not even being held in trust by the United States or otherwise subject to federal restrictions. Appendix, p. 44.

Citing with approval State of Georgia v. City of Chattanooga, 264 U.S. 472 (1924), this Court has unambiguously held that the power of a city to condemn does not depend upon the consent or suitability of the owner. Paulus v. State of South Dakota, 227 N.W. 52, 55 (N.D. 1929). As a result, a condemnation action should proceed solely as an *in rem* action enforceable in North Dakota, notwithstanding the identity or location of any person with an interest in the real property.

If the district court's ruling is to stand, every political subdivision of North Dakota with eminent domain authority and responsibility, as well as the very sovereign state of North Dakota itself, is at risk. If allowed to stand, the state and its political subdivisions could be prevented from or delayed in pursuing any public

interest projects requiring condemnation for the public good by the self serving or even vindictive acts of a single landowner.

As the trial court's Memorandum Opinion conceded:

Truly the facts of this case present a conundrum. The record shows that the Tribe purchased the 1.43 acres from a non-Indian. The parcel in question has never been part of reservation lands set aside for exclusive and absolute use by the Tribe and is located hundreds of miles outside the current exterior boundaries of the reservation. If tribal immunity bars the condemnation proceeding, the common sense result is that a non-Indian could convey real property to an Indian tribe, not even located in the State of North Dakota, for purposes of stalling any street, water, sewage, road or other public improvement project. Such a result infringes upon the sovereign immunity of the State of North Dakota to provide for public safety, health, and welfare of its people who benefit – including Indians – from such public improvements. The State's projects will either be permanently stalled, or the State will be forced to pay exorbitantly high prices to purchase the land through private sale. Given this result, it defies common sense to suggest that Congress intended a tribe's sovereign immunity principles to extend so far.

Appendix p. 135-136.


The sovereignty of North Dakota and its political divisions urges a reversal of the district court's judgment. All citizens of North Dakota who are entitled to the expectations of governmental protection and safety through its sovereign powers, ought not to have the district court's judgment and its potential disastrous results ratified by this Court, especially when the statutory and common law of North Dakota, as well as of the United States, do not support the trial court's conclusions.

CONCLUSION

For the reasons discussed above, and for the reasons set out in the brief of the appellant, the district court's judgment in this matter should be reversed.

RESPECTFULLY SUBMITTED this 16th day of November, 2001.

NORTH DAKOTA ASSOCIATION OF
COUNTIES – Amicus Curiae

By: 
Calvin N. Rolfson
Attorney at Law

CERTIFICATE OF SERVICE

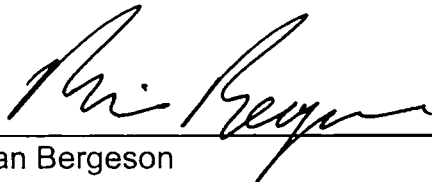
I hereby certify that a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE, NORTH DAKOTA ASSOCIATION OF COUNTIES** was on the 16th day of November 2001, mailed to the following:

Steven E. McCullough
Attorney at Law
Ohnstad Twitchell, P.C.
PO BOX 458
West Fargo, ND 58078-0458

Russell J. Myhre
Attorney at Law
210 Third Avenue
Enderlin, ND 58027

Courtney M. Koebele
Sarah M. Vogel
Attorneys at Law
Wheeler Wolf Law Firm P.C.
P.O. Box 2056
Bismarck, ND 58502-2056

Ms. Jerilyn DeCoteau
Attorney at Law
2620 Cornell Circle
Boulder, CO 80305



Brian Bergeson
Attorney at Law